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U.S. SUPREME COURT

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 375

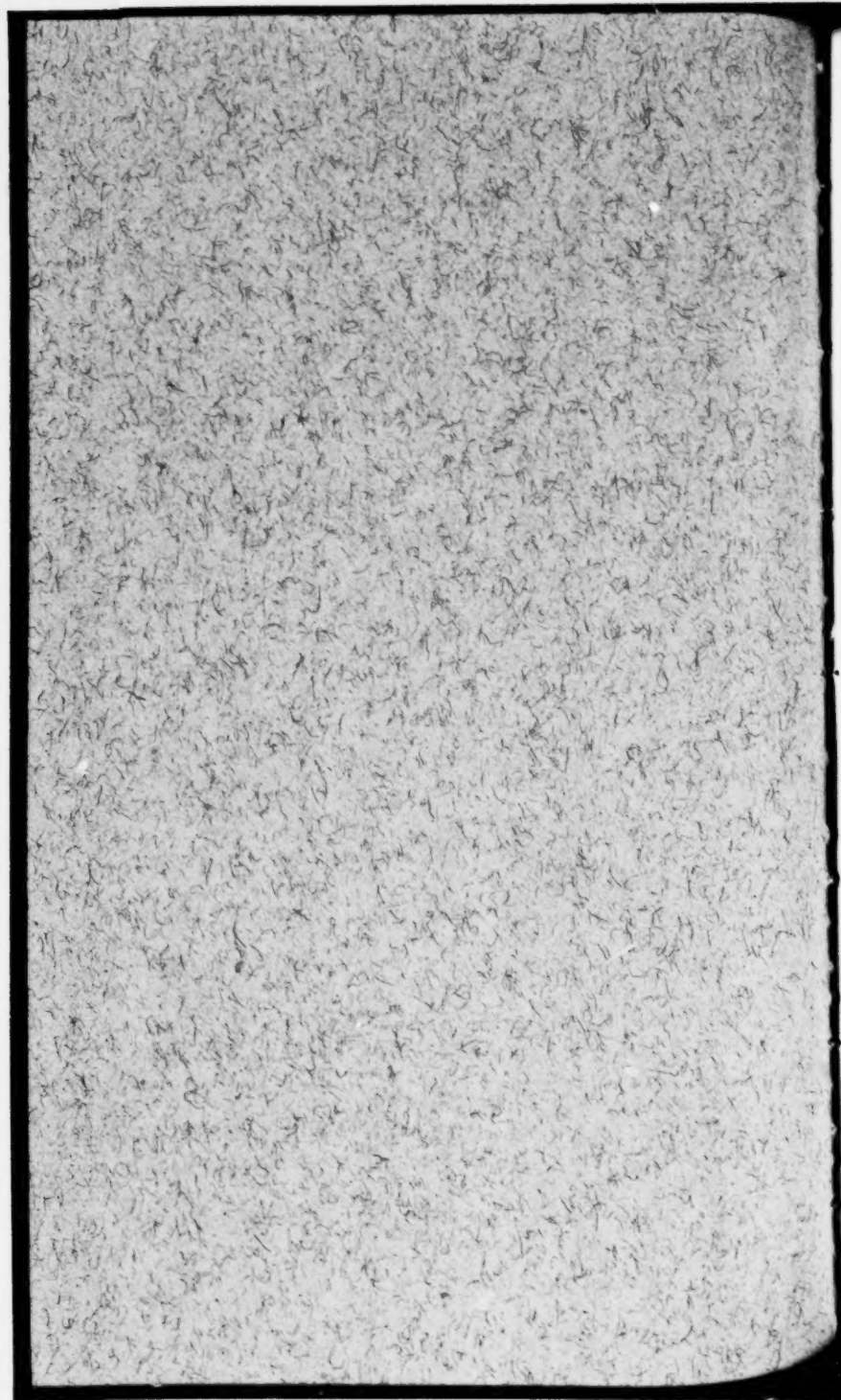
TOMBIGBEE MILL & LUMBER COMPANY, ET AL.,
Petitioners,

vs.

MRS. SARAH HOLLINGSWORTH, ET AL.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT AND BRIEF IN SUP-
PORT THEREOF.**

**JOHN H. HOLLOWMAN,
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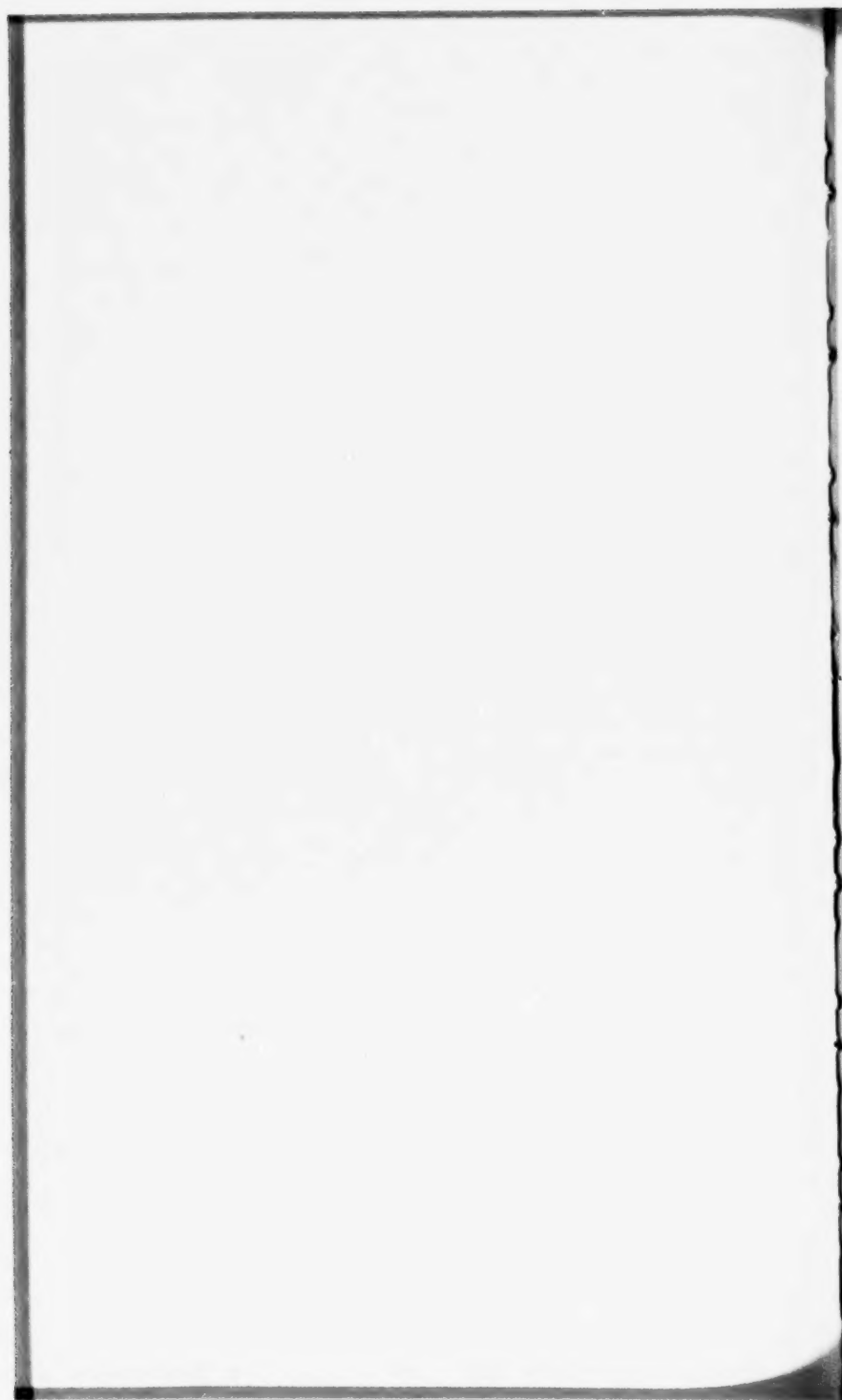
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No. 375

TOMBIGBEE MILL & LUMBER COMPANY, ET AL.,
Petitioners,
vs.

MRS. SARAH HOLLINGSWORTH, ET AL.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.**

I

The Tombigbee Mill & Lumber Company and the Western Casualty & Surety Company, by and through their attorneys, pray that a writ of certiorari issue to the Circuit Court of Appeals for the Fifth Circuit directing it to send up the record in the above styled and entitled cause to be reviewed by this Court, and such order entered therein as may appear to be meet and proper from the record in this cause.

II

Jurisdiction

The jurisdiction of this Court is invoked and a review sought under the provisions of the statutes, decisions and rules of this Court governing the granting of writs of certiorari.

A. The provisions of Section 240 of the Judicial Code, as amended, Section 347, Title 28, U. S. C. A.

B. The provisions of Rule 38 of this Court, and particularly paragraph 5 (b), as follows:

(1) That the Circuit Court of Appeals for the Fifth Circuit has rendered a decision in the case at bar which is in direct conflict with the decision of the Circuit Courts of Appeals of the Sixth, Eighth, and Tenth Circuits involving the same or exactly similar questions.

(2) That the Circuit Court of Appeals for the Fifth Circuit has decided an important question of local law (that is a question of common law), in conflict with the applicable local decisions (that is, the decisions of the Mississippi Supreme Court); all in violation of the principles decided in *Erie v. Tompkins*, 304 U. S. 64; 82 L. Ed. 1188.

(3) That the Circuit Court of Appeals for the Fifth Circuit in deciding the case at bar has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower Federal Court as to call for an exercise of this Court's power of supervision, in these particulars, to-wit:

(a) The trial Judge who charged the jury that, "If in your judgment negligence which proximately contributed to the injury in this case has been proven, you may then, in the absence of proof to the contrary, indulge the presumption that Mr. Hollingsworth was at the time of his injury engaged in his master's business and was exercising reasonable care for his own safety"; which said instruction is in direct conflict with the decisions of the Supreme Court of the State of Mississippi; and is likewise in direct conflict with the decisions of the Circuit Courts of Appeal in other districts; and in direct conflict with the decisions of the Supreme Court of the United States.

(b) The Circuit Court of Appeals for the Fifth Circuit, in deciding the case at bar, approved the

action of the trial Court in submitting this case to the jury when there was no question of fact to be submitted to the jury; which action by the said trial Court is in conflict with the decisions of the Honorable Supreme Court of the United States, and likewise in conflict with the decisions of the Supreme Court of the State of Mississippi.

III

Case History

We will give a condensed history of this case with a view of presenting fairly and impartially the facts and/or points wherein the trial Court, as well as the Appellate Court erred:

Bill Hollingsworth, the husband of Mrs. Sarah Hollingsworth, and the father of Sue Hollingsworth, was an employee of the Tombigbee Mill and Lumber Company and met his death on January 22, 1946 by the cuff on the bottom of the leg of his overalls getting caught in a set screw on a revolving shaft.

There were no eye witnesses to this accident and it is purely a matter of speculation, guess and/or conjecture as to how and why and when this accident occurred.

It is reasonably certain from the evidence that the accident occurred some where around 9:00 to 9:30 o'clock in the morning.

The Appellees filed their suit in the United States District Court for the Northern District of Mississippi, alleging that the deceased lost his life in and about the performance of duties that were assigned by the master; and the master denied that the deceased was in the performance of any duties assigned to him at the time of his death.

The case proceeded to trial on this clean cut issue and at the conclusion of the testimony for the Appellees and also at the conclusion of the testimony for the Appellant, there

was a complete absence of positive proof (1) to show that the deceased was performing any duties at the time of his death as directed by the master, (2) to show how and why the deceased came in contact with the revolving shaft.

Notwithstanding these facts, the trial Court sent the case to the jury; and sent the case to the jury under wholly erroneous instructions. The jury returned a verdict for \$20,000.00, and the case was affirmed by the Circuit Court of Appeals.

The set screw that caught the cuff of the overalls of deceased was some 42 inches above the ground, near an oil cup, and within a few inches of a six by eight inch timber. While there is no proof in the record of this fact, it seems obvious that the deceased was on this piece of timber, but for what purpose is not known. It is the theory of Appellees that the deceased was there to put oil in this cup; whereas, it is the theory of Appellants that he was there because he was going to or returning from the boiler room, where he had been directed by his foreman to go to dry and warm his feet.

Summarized and condensed, here is the evidence supporting these theories: One witness testified that some time about an hour or an hour and a half before the tragedy, that the Superintendent, J. E. Bishop, told the deceased to "go down and oil the machine this morning", and that Mr. Hollingsworth replied, "I don't want to go down there, I feel like something is going to happen"; and that Mr. Bishop told him, "Go ahead, I will get somebody else after today."

This testimony was not only contradicted by witnesses and circumstances; but we submit that it was wholly insufficient to carry the case to the jury or sustain a verdict, for several reasons: (1) This testimony does not identify any "machine"—and the proof in the record shows that there were more than 80 oil boxes in this sawmill plant.

(2) The engine and other machinery was on the ground floor and the sawmill and planing mill were on the floor above; and the guess, or conjecture that this alleged instruction applied to the oil box which it is alleged the deceased was oiling is negatived by the fact that another man was on the job oiling this particular box on this particular day. This is an uncontradicted fact. (3) The witness fixes the time as about eight o'clock when this instruction is alleged to have been given—and the record clearly and uncontradictedly accounts for the deceased's whereabouts for the next hour, during all of which he was working under and was subject to the orders and directions of another foreman. (4) This foreman under whom the deceased was working immediately prior to his death swore positively that deceased had no duties whatever to perform at or near the place where he was killed. (5) This foreman swore that only some fifteen minutes before this tragedy, (and the very last instructions given the deceased), that he told said deceased to go to the boiler room and dry and warm his feet. (6) That only the day before this accident deceased came from the boiler room walking on the very timber he is supposed to have been walking on when killed, and that said foreman warned the deceased against walking thereon. (7) That deceased had been warned and instructed never to oil the machinery while it was in motion, and that, if deceased wanted to oil the machinery he could have stopped said machinery.

Here is a more potent and absolutely conclusive reason why the testimony about Bishop telling the deceased to oil the machine is of no probative value whatever: said instructions were given to the deceased about eight o'clock, according to the witness, and he was killed somewhere around nine or nine thirty. There is nothing in the record to show whether or not the deceased had ever oiled any machine prior to the time of his death, but there is uncontradicted

and therefore conclusive proof in the record that at the time Hollingsworth was killed, and for at least a half hour prior thereto, he was not subject to the orders and directions of Bishop, but was subject to the orders and direction of Dodson, the mill foreman. The very last instructions that were given to the deceased prior to his death were given by Dodson and in the presence of Bishop, and these instructions were, to "go to the boiler room and dry and warm your feet", and this testimony is likewise uncontradicted and therefore conclusive that at the time Hollingsworth met his death he had no duties whatever to perform for his master at any point near where he was killed.

To summarize: there was not a word of positive testimony to support the contention of Appellees that the deceased was ever ordered or directed by the master to perform any duties at the place where he met his death, nor was there any positive testimony of any kind to show that deceased was performing any duty for the master at said time and place; but there was only the weakest of guess, speculation or conjecture. In support of the theory of Appellant there was clear, positive and uncontradicted testimony by the immediate foreman of the deceased that the said deceased had no duties whatever to perform for the master at the time and place where he met his death.

The decisions of the trial Court and the Circuit Court of Appeals are therefore in direct conflict with the decisions of the Supreme Court of the State of Mississippi and with the Circuit Courts of Appeals for other districts and of the Supreme Court of the United States.

Respectfully submitted.

JOHN H. HOLLOMAN,
T. C. HANNAH,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The testimony offered for Appellees, viewed in its most favorable aspects, rises no higher than guess, speculation or conjecture. One must guess as to "what machine" was meant by the instruction; and, guess as to whether the deceased was there for oiling this machine or on his way to, or from the boiler room; and guess as to why deceased would try to oil when the machinery was in motion when he had been instructed not to do so; and finally, even if he was oiling, why he brought his trousers leg in contact with this set screw.

The holding of the Court in the case at bar is in direct conflict with the holding in the case of—

Vestland Oil Company v. Firestone Tire & Rubber Co.
(Eighth Circuit) 143 Fed. (2) 326.

"As the proof rests upon circumstances, these circumstances must do more than bring plaintiff's theories within the realm of possibilities."

Citing

Franklin v. Skelly Oil Company (Tenth Circuit) 141
Fed. (2) 568;

Epperson v. Midwest Refining Company (Eighth Circuit) 22 Fed. (2) 622.

Likewise the holding in the case at bar is in direct conflict with the holding of this Court in *Chicago, M. & St. P. Railroad Co. v. Coogan*, 271 U. S. 472, 70 L. Ed. 1041, wherein the Court said:

"It follows that, unless the evidence is sufficient to warrant a finding that the death resulted from the catching of deceased's left foot under the bent part of the pipe line, the judgment cannot be sustained. As

there is no direct evidence, it is necessary to determine whether the circumstances are sufficient to warrant a finding of that fact. Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved, and not themselves presumed. *United States v. Ross*, 92 U. S. 281, 284, 23 L. Ed. 707, 708; *Manning v. John Hancock Mut. L. Ins. Co.*, 100 U. S. 693, 698, 25 L. Ed. 761, 763."

The most that can be said of the testimony for Appellees, is that it presented a theory in conflict with the theory of Appellants; and the holdings of the trial Court and the Court of Appeals are in direct conflict with the holdings of the Circuit Courts of Appeals for the Eighth and Sixth Circuits.

In *Westland Oil Co. v. Firestone*, *supra*, the Court said:

"To submit to the jury a choice between probabilities is to permit them to conjecture or guess, and where evidence is clearly circumstantial with two opposing hypotheses, it is without probative force and tends to support neither." (Citing *Parker v. Gulf Refining Company* (Sixth Circuit) 80 Fed. (2) 795; *DuPont v. Baridon*, 73 Fed. (2) 26.)

And in *Parker v. Gulf Refining Company* (Sixth Circuit, 80 Fed. (2) 795, the Court says:

"To submit to a jury a choice of probabilities is but to permit them to conjecture or guess, and where the evidence presents no more than such choice, it is not substantial. This has been repeatedly pointed out by this Court. *Davlin v. Henry Ford & Son* (C. C. A.) 20 F. (2) 317; *Louisville, etc. R. Co. v. Bell* (C. C. A.) 206 F. 395; *Toledo, etc. Ry. Co. v. Howe* (C. C. A.) 191 F. 776, 782; *Virginia & S. W. R. Co. v. Hawk* (C. C. A.) 160 F. 348, 352. The opinion of the expert that the accident occurred as the result of bumping is supported by nothing more than that bumping does frequently occur with most liquids when they are superheated,

and the circumstance that wax was found two months after the accident at a spot upon the kitchen floor remote from the stove. To connect the latter with the accident, there must first arise a reasonable inference that the wax was thrown from the pan at the time it occurred. This superposing of inferences does not constitute substantial evidence. *Pennsylvania R. Co. v. Chamberlain, Adm'x.*, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819."

In this case of *Pennsylvania R. Co. v. Chamberlain*, the Court said:

"It, of course, is true, generally, that where there is a direct conflict of testimony upon a matter of fact, the question must be left to the jury to determine, without regard to the number of witnesses upon either side. But here there really is no conflict in the testimony as to the *facts*. The witnesses for petitioner flatly testified that there was no collision between the nine-car and the two-car strings. Bainbridge did not say there was such a collision. What he said was that he heard a "loud crash," which did not cause him at once to turn, but that shortly thereafter he did turn and saw the two strings of cars moving together with the deceased no longer in sight; that there was nothing unusual about the crash of cars—it happened every day; that there was nothing about this crash to attract his attention except that it was extra loud; that he paid no attention to it; that it was not sufficient to attract his attention. The record shows that there was a continuous movement of cars over and down the "hump", which were distributed among a large number of branch tracks within the yard, and that any two strings of these cars moving upon the same track might have come together and caused the crash which Bainbridge heard. There is no direct evidence that *in fact* the crash was occasioned by a collision of the two strings in question; and it is perfectly clear that no such fact was brought to Bainbridge's attention as a perception of the physical sense of sight or of hearing.

At most there was an inference to that effect drawn from observed facts which gave equal support to the opposite inference that the crash was occasioned by the coming together of other strings of cars entirely away from the scene of the accident, or of the two-car string ridden by deceased and the seven-car string immediately ahead of it.

We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover."

The above statement is supported by the citation of a wealth of authorities.

The trial Court and the Court of Appeals decided the case at bar in direct conflict with the uniform holdings of the Mississippi Supreme Court—

In *Berryhill v. Nichols*, 158 So. 470, 171 Miss. 679, the Mississippi Court said: "It is essential as an element of liability under our wrongful death statute (Code 1930, Section 510) that the negligence complained of shall be the proximate cause, or at least a directly contributing cause, of the death which is the subject of the suit. The negligence, and not something else, must have been the cause which produced or directly contributed to the death. *Hamel v. Southern Ry. Co.*, 113 Miss. 344, 358, 74 So. 276. And, as in other cases, this essential element must be proved as a reasonable probability. To prove no more than that it was a possibility is not a sufficient foundation for the support of a verdict or judgment."

This doctrine has been reannounced and approved by our Court in the following cases: 4

Columbus & Greenville Railroad Company v. Coleman,
160 So. 277, 172 Miss. 514;

Yazoo & M. R. Company v. Lamensdorf, 177 So. 50, 180 Miss. 426. Suggestion of Error, 178 So. 80;
Teche Lines v. Bounds, 179 So. 747, 182 Miss. 638;
Mutual Benefit Health & Accident Association v. Johnson, 186 So. 297;
Kramer Service v. Wilkins, 186 So. 625, 184 Miss. 483;
Anderson Clayton Company v. Rayburn, 192 So. 28;
Sanders v. Smith, 27 So. (2) 889.

The trial Court and Court of Appeals have therefore decided the case at bar in direct conflict with the holding of this Court in *Erie Railroad Company v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188.

On this record of nothing except guess, speculation or conjecture to support the theory of Appellees as to why and how the deceased came in contact with this revolving set screw, and also positive and uncontradicted testimony on behalf of the Appellants that the deceased had no duties whatever to perform at that point for the master, the trial judge instructed the jury "If in your judgment negligence which proximately contributed to the injury in this case has been proven, you may then, in the absence of proof to the contrary, indulge the presumption that Mr. Hollingsworth was at the time of his injury engaged in his master's business and was exercising reasonable care for his own safety." Timely objections were made and exceptions taken.

It is respectfully submitted that the trial Court erred in giving this instruction, and that the Court of Appeals erred in approving the action of the trial Court. This course of proceedings has been condemned both by the Supreme Court of the State of Mississippi and by the Supreme Court of the United States.

In *Bridges v. State*, 197 Miss. 527, 19 So. (2) 738, the Court said:

“When the entire case is before the jury, there is no need *nor right* to charge them upon a presumption.” (Italics ours.)

To the same effect are the cases of—

N. O. & G. N. Railroad Company v. Waldon, 160 Miss. 102, 133 So. 241;

Natchez Coca Cola Bottling Company v. Watson, 160 Miss. 173, 133 So. 677.

In *Quock Ting v. U. S.*, 140 U. S. 417, 35 L. Ed. 501, Mr. Justice Field speaking for the Court said:

“Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by anyone, should control the decision of the Court.”

This same principle has been approved by the Mississippi Supreme Court in the case of—

Board of Miss. Levee Com'rs. v. Montgomery, 145 Miss. 578, 110 So. 845, and

Carrere v. Johnson, 149 Miss. 105, 115 So. 196.

In the case at bar, the deceased was at the time of his death subject directly and only to the orders of Dodson, and the testimony of Dodson stands uncontradicted that the deceased had no duties whatever to perform for the master in and around the place where he met his death.

In the very recent case of the Mississippi Supreme Court of *Sanders v. Smith*, 27 So. (2) 889, this Court said:

“But death alone is insufficient to establish both its cause and an inference of negligence therefrom.”

In the case of *Westland Oil Company v. Firestone Tire & Rubber Company*, 143 Fed. (2) 326, the Eighth Circuit Court of Appeals said:

“As the proof rests upon circumstances, these circumstances must do more than bring plaintiff’s theories within the realm of possibilities.”

In *Mobile & Ohio R. Company v. Clay*, 156 Miss. 463, 125 So. 819, the Mississippi Supreme Court said:

“Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved, and not themselves presumed. See *Manning v. Insurance Co.*, 100 U. S. 693, 25 L. Ed. 761.”

It follows that the above instructions by the trial Court is violative of the law long since announced by the Honorable Supreme Court of the United States and by the Supreme Court of the State of Mississippi.

We therefore respectfully submit that an examination of the record in this case will clearly reveal:

First, that the decision in case at bar, by the trial Court and by the Appellate Court is in direct conflict with the holdings of the Circuit Courts of Appeal for the Sixth Circuit, the Eighth Circuit and the Tenth Circuit, on the identical question involved in the case at bar.

Second, that the holdings of the trial Court and of the Circuit Court of Appeals in the case at bar are in direct and hopeless conflict with the decisions of the Mississippi Supreme Court, the decision of other Circuit Courts of Appeal and the decisions of the United States Supreme Court.

Third, that the holding of the trial Court and the Appellate Court in the case at bar with reference to the instructions given by the trial Court are in direct and hopeless conflict with the decisions of the Mississippi Supreme Court, the Circuit Courts of Appeal of the other districts, and of the decisions of the United States Supreme Court.

Fourth, that the holdings of the trial Court and of the Appellate Court in submitting this case to the jury are in direct conflict with the holdings of the Mississippi Supreme Court, the Circuit Courts of Appeal of other districts and of the United States Supreme Court.

WHEREFORE, it is respectfully submitted that the record in this case should be considered by the Honorable Supreme Court of the United States and should be reversed with proper directions.

Respectfully submitted,

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